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No. 282

In the Supreme Court of the United States

OCTOBER TERM, 1930

BONWIT TELLER & COMPANY, PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the Court of Claims (R. 18) is reported in 39 F. (2d) 730 and 69 C. Cls. 638.

JURISDICTION

The judgment of the Court of Claims was entered on April 14, 1930. (R. 30.) The petition for certiorari was filed July 9, 1930 (R. 30), and was granted October 13, 1930 (R. 31). The jurisdiction of this Court rests on Section 3 (b) of the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a taxpayer can recover an overpayment of tax as to which the Commissioner of Internal Revenue has approved a certificate of overassessment, in spite of the fact that no claim for refund was filed within the time required by statutes.

2. Whether Section 3226 of the Revised Statutes, as amended by Section 1113 (a) of the Revenue Act of 1926, applies to this suit.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set out in the Appendix, *infra*, pp. 15–19.

STATEMENT

On July 14, 1919, the petitioner filed its income and profits tax return for the fiscal year ended January 31, 1919, and paid the taxes so returned on July 14, 1919, and December 13, 1919. (R. 13.) The Commissioner of Internal Revenue on November 19, 1924, advised the petitioner that the tax paid on this return was $10,866.43 in excess of the correct tax liability. (R. 14.)

The period of limitations then in force for the filing of a claim for refund had expired, and no claim had been filed. By the Act of March 3, 1925, c. 435, 43 Stat. 1115, the period was extended to permit a refund or credit if a claim was filed prior to April 1, 1926, and if a waiver was filed on or before June 15, 1925. On May 16, 1925, the officials

in the Bureau of Internal Revenue wrote to the taxpayer (R. 14–15):

> An examination of your income-tax return for the year ended January 31st, 1919, discloses an apparent overassessment of tax for the year. It appears that the overassessment can not now be allowed, due to the limitation of time for allowance thereof, provided by section 281 of the revenue act of 1924, unless an income and profits-tax waiver is filed on or before June 15th, 1925, as provided by an act of Congress dated March 3, 1925, amending section 281 E of the revenue act of 1924. Two waiver forms are, therefore, enclosed in order that you may, if you desire, execute and forward one of the forms to this office.

Thereupon the taxpayer executed and filed the waiver, and the Bureau received and accepted it on May 23, 1925. (R. 15.) Although there is no express statement in the findings that no claim for refund was filed at that time, it appears that everything that was done by the parties is narrated in the findings, and it is obvious that nothing was filed by the taxpayer except the waiver and the letter stating that the waiver was enclosed. (See R. 14–17.) Some official of the Bureau of Internal Revenue marked the taxpayer's letter inclosing the waiver as follows (R. 17):

> Inferential demand for the refund upon basis of the schedule sent taxpayer under date

of November 19, 1924 (IT:CR:A:JML). Rules and Regulations. Mulligan.

Nothing more was done until December 11, 1926 (after the time set by the statute for filing a claim for refund), when the taxpayer wrote a letter requesting payment of the refund. (R. 14.) On February 9, 1927, the Commissioner advised the petitioner that a claim for refund on proper form should be filed. (R. 15.) On February 19, 1927, such a formal claim was filed. (R. 16.) A certificate of overassessment for $10,866.43 was prepared and on March 8, 1927, the Commissioner allowed the claim and approved the certificate of overassessment. (R. 17.)[1] The Collector credited $9,846.06 of the allowed amount against an unpaid assessment for the year 1917. (R. 17.) A certificate of overassessment, together with a check for the balance with interest, was delivered to the petitioner on May 12, 1927. (R. 6, 17.) The petitioner protested against the credit upon the ground that the collection of the unpaid assessment for 1917 was barred and accordingly it did not cash the check, but held it and offered to apply it against the present claim.

On December 27, 1927, the petitioner brought this suit claiming $10,866.43. The respondent an-

[1] At the time in question the procedure in force under the Revenue Act of 1926 was different from that discussed by this Court in the case of *Swift & Co.* v. *United States*, No. 56, October Term, 1930, decided February 2, 1931. It is, therefore, conceded that the claim was allowed on March 8, 1927. See Section 1116 (b) (2) of the Revenue Act of 1926.

swered and at a much later time filed a counterclaim for the amount of the payment covered by the check upon the ground that it constituted an unauthorized refund of money, as no claim for refund had been filed within the time prescribed by law. (R. 10–11.) The court dismissed the petition and the respondent's counterclaim. (R. 30.)

SUMMARY OF ARGUMENT

1. The taxpayer was entitled to a refund only if claim therefor was filed either on or before April 1, 1926, or within four years from the time the tax was paid. (Act of March 3, 1925, p. 15, *infra*.) No such claim was filed within that time. The taxpayer contends that the Government can not challenge the action of the Commissioner in allowing the claim in the absence of proof of "fraud or mistake," but the requirement would seem to be jurisdictional and one which the Commissioner can not waive. Compliance with the statutory requirement is not excused by the fact that the taxpayer was not requested to file a claim for refund, but only a waiver, which it did file.

2. Even if the Commissioner's allowance of the claim must stand, the taxpayer can not recover, as this suit was not brought within five years from the date of the payment of the tax (§ 3226 R. S., as amended by § 1113 of the Revenue Act of 1926, pp. 15–16, *infra*). The clause in this statute permitting suit "within two years after the disallowance" of a claim for refund has no application here, since in

the instant case the claim for refund was not disallowed.

ARGUMENT

I

AS NO CLAIM FOR REFUND WAS FILED PRIOR TO APRIL 1, 1926, THE COMMISSIONER HAD NO AUTHORITY TO ALLOW THE PETITIONER'S CLAIM

The petitioner's return was filed on July 14, 1919, and its taxes were paid by December 13, 1919. The four year general limitation for filing a claim for refund under Section 3228 of the Revised Statutes expired on December 13, 1923; and the five year period provided in Section 252 of the Revenue Act of 1921 and Section 281 (f) of the Revenue Act of 1924 expired on July 14, 1924. At the latter date no claim for refund had been filed and the Commissioner had no authority to make a refund.

The Act of March 3, 1925 (*infra*, p. 15), amending Section 281 (e) of the Revenue Act of 1924, provided—

> If the taxpayer has, on or before June 15, 1925, filed such a waiver in respect of the taxes due for the taxable year 1919, then such credit or refund relating to the taxes for the taxable year 1919 shall be allowed or made if claim therefor is filed either on or before April 1, 1926, or within four years from the time the tax was paid.

In May, 1925, the Bureau sent a letter to the petitioner stating that an overassessment could not be allowed unless a waiver was filed. The Bureau

made no specific request for a claim for refund, although it did mention the above act, which required the filing of such a claim before April 1, 1926. The petitioner filed such a waiver before June 15, 1925, but neglected to file a claim for refund before April 1, 1926. The express condition of the only statute which could possibly have permitted the refund, namely, "if claim therefor is filed * * * before April 1, 1926," was never satisfied. After April 1, 1926, the Commissioner had no authority to make a refund or pass favorably on a refund claim.

At some time which does not clearly appear but which apparently was after April 1, 1926, the Commissioner's office made indorsements on the taxpayer's letter which accompanied the waiver, treating it as a claim for refund. On February 19, 1927, the petitioner filed a claim for refund of these taxes, and on March 8, 1927, this claim was allowed by the Commissioner. We submit that the Commissioner had no authority to allow the claim.

The petitioner contends that an "informal claim for refund" was filed within time and that it was perfected after the statute had run. Relying upon the presumption of propriety attaching to the certificate of the Commissioner, it argues that in the absence of positive finding that an informal claim for refund was not filed it must be presumed that some kind of a claim was filed. Although there is no categorical statement in the findings that an in-

formal claim for refund was not filed, the findings obviously narrate everything that was done, and it appears from them (particularly from the letter of counsel for the taxpayer dated December 11, 1926) that the taxpayer did nothing more than to reply to the Bureau's request for a waiver by sending a waiver and a covering letter which contained no mention of a claim for refund.

A claim for refund is a formal prerequisite to suit. It is established that literal compliance with this statutory requirement may be insisted upon by the United States. *Rock Island Railroad Co.* v. *United States*, 254 U. S. 141. There is a dual purpose in the requirement that claims for refund be filed. One well recognized purpose is to advise the Commissioner of the grounds asserted by the taxpayer for the claim for refund so as to give the authorities opportunity to correct errors administratively and avoid litigation. Another purpose is to extend the time within which the Commissioner may make the refund. Without a claim for refund the Commissioner's authority to act is limited as to time by statute. Upon the filing of a claim for refund within the limited period, the Commissioner's authority is extended until his final decision on the claim. We submit that the authority of the Commissioner to waive compliance with the statute requiring the filing of the claim for refund is limited to waiver of the sufficiency of claims properly filed.

In the absence of any claim, the Commissioner has no jurisdiction to allow an overassessment.[2]

In the instant case neither of the documents filed within the statutory period—the waiver and letter accompanying it—requested the repayment of taxes. We submit that the Commissioner was not authorized to treat them as a claim for refund. His "allowance" should not be considered to constitute a basis for this suit. The two cases most strongly relied upon by the petitioner on this point, *Zeller* v. *United States*, 35 F. (2d) 870, and *Art Metal Construction Co.* v. *United States*, 35 F. (2d) 379, have been reversed by the Circuit Court of Appeals for the Second Circuit in opinions handed down on February 2, 1931. See also *United States* v. *Felt & Tarrant Mfg. Co.*, No. 116, October Term, 1930, recently argued before this Court.

But the petitioner contends that even if no claim for refund was filed in time the courts may not review the Commissioner's act in allowing the claim. *United States* v. *Kaufman*, 96 U. S. 567, and *United States* v. *Savings Bank*, 104 U. S. 728, are cited in support of this position. Those cases hold that when the Commissioner *with authority* allows a claim for refund, that allowance is an

[2] In *Tucker* v. *Alexander*, 275 U. S. 228, which is relied upon by the taxpayer, the Court held that the Government during the trial of a case could waive the insufficiency of a claim for refund which had been filed. But there a claim for refund had been filed and the stipulation which operated as the waiver was executed before the statute of limitations had run.

account stated and evidence of an implied contract on which, within the proper period of time, the taxpayer may sue the United States. In the instant case the unauthorized acts of the Commissioner should not bind the United States on any such theory of implied contract. Similarly the earlier decisions of the Court of Claims relied on by the petitioner, *Bank of Greencastle* v. *United States*, 15 C. Cls. 225, and *Woolner* v. *United States*, 13 C. Cls. 355, both recognized that the Commissioner must act within the scope of his authority. The contention of the petitioner is apparently that the agent's decision on the scope of his authority is final. We submit that the Commissioner has no such uncontrolled power to bind the United States. If, in the words of the statute, no "claim therefor is filed * * * before April 1, 1926," then no "credit or refund relating to the taxes for the taxable year 1919 shall be allowed or made."

The Government's position in the instant case is supported by Sections 608 and 610 of the Revenue Act of 1928 (*infra*, pp. 16–17). Those sections contemplate review of the Commissioner's action in just such a case as this. Should the Commissioner now refund the money sought by the petitioner, the United States could under Section 610 institute a suit to recover that refund on the ground that under Section 608 the refund was erroneous because made "after the expiration of the period of limitation for filing claim therefor" where within such period no claim was filed.

II

EVEN IF THE COMMISSIONER'S ALLOWANCE WAS AUTHORIZED THIS SUIT IS BARRED BY LAPSE OF TIME

Should it be determined that a sufficient claim for refund was filed in time so that the Commissioner's action in allowing it was authorized, nevertheless we question whether recovery should be allowed in view of the provisions of Section 3226 of the Revised Statutes, as amended by Section 1113 of the Revenue Act of 1926 (*infra*, pp. 15–16). That statute provides:

> No suit or proceeding * * * for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected * * * shall be begun * * * after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates.

The petitioner paid its income and profits taxes for the fiscal year in question on July 14, 1919, and December 13, 1919. The five-year period expired on December 13, 1924. This suit was begun on December 27, 1927. The clause permitting suit "within two years after the disallowance" of a claim for refund has no application here, since in the instant case the claim for refund was not disallowed.

The petitioner does not allege any disallowance of any claim for refund within the two-year period, but instead contends that this suit is not subject to

the limitations of Section 3226. It argues that this is not a proceeding to recover taxes, but rather an action on an implied contract. It urges that the allowance of its "inferential claim" by the Commissioner was an account stated upon which the United States is liable, and cites *United States* v. *Savings Bank*, 104 U. S. 728, *supra*, in support of its position. But in that case no defense was made on the basis of the statute of limitations. And the suit was brought within two years after the appeal was allowed by the Treasury Department. This was within the period of time allowed for suits to recover taxes by Sections 3226 and 3227 of the Revised Statutes as they then existed (*infra*, pp. 18–19).

Similarly the instant suit may be on an account stated, if it be assumed that the Commissioner had authority to allow the claim for refund. But it is also a suit for the recovery of taxes,[8] and on such a ground the United States may be sued only as it has consented to be sued, namely within the limited period of time prescribed by Section 3226.

The petitioner also relies upon *Peerless Paper Box Mfg. Co.* v. *Routzahn*, 22 F. (2d) 459 (N. D.

[8] That this is the character of this proceeding is indicated by the prayer for interest in the petition in the court below (R. 7) seeking interest from July 10, 1919, the date of the alleged overpayment. On the account stated theory no interest would be allowable against the United States (Jud. Code, sec. 177; U. S. C., title 28, sec. 284); if it were allowable, it would run only from March 8, 1927, the date of the allowance and accrual of any contractual right of action.

Ohio). In that case a refund was allowed but was applied in payment of a barred tax for 1917. A claim for the refund of the 1917 tax so paid was filed and rejected, and the suit was brought, as permitted by Section 3226, within two years of the disallowance of that claim for refund. The decision was that the application of a credit in payment of a barred tax is an illegal collection. In the instant case it is conceded that the application of the credit was void, but the Government maintains that the suit was not brought in time.

In *Jenkins Steamship Co.* v. *Routzahn* (N. D. Ohio, reported in Paragraph 1638 of the 1930 Prentice Hall Federal Tax Service) another judge in the same court which decided the *Peerless Paper Box Co.* case held that a suit to recover a tax paid out of time by the application of a refund as a credit was barred by the limitations of Section 3226, as it was not brought within five years from the date of payment of the tax and no claim for the refund of the tax paid by the credit was filed.

In *Wm. J. Friday & Co., Inc.,* v. *United States* (W. D. Pa., decided February 2, 1931, reported in Paragraph 615 of the 1931 Prentice Hall Federal Tax Service) it was held that Section 3226 barred recovery.[4] There the Commissioner scheduled an

[4] See also *Moses* v. *United States*, 43 F. (2d) 653 (E. D. N. Y.), where the same point was raised and the court stated that the suit was one to recover an overpayment of taxes, although it held that it was barred by both Section 3226 and the ordinary six-year period from the accrual of the cause of action. Apparently a contrary view was taken in the

overpayment of 1919 taxes, the Collector credited part of it against a barred 1917 tax liability, and without filing a claim for refund the taxpayer sued more than five years after the 1917 tax had been paid by the application of the credit. The Government's demurrer was sustained. The case is authority that the suit was one for the recovery of taxes, and thus subject to the provisions of Section 3226, although the Commissioner had stated an account with the taxpayer and made an implied contract on behalf of the United States.

CONCLUSION

The decision of the court below is correct and its judgment should be affirmed.

Respectfully submitted.

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MARCH, 1931.

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opinion in *United Motor Corporation* v. *United States*, 44 F. (2d) 407, 409 (S. D. N. Y.), but the court's comments on this point were express *dicta*.

APPENDIX

STATUTES AND REGULATIONS INVOLVED

STATUTES

The Act of March 3, 1925, c. 435, 43 Stat. 1115, provides:

> That subdivision (e) of section 281 of the Revenue Act of 1924 is amended by adding thereto two new sentences to read as follows: "If the taxpayer has, on or before June 15, 1925, filed such a waiver in respect of the taxes due for the taxable year 1919, then such credit or refund relating to the taxes for the taxable year 1919 shall be allowed or made if claim therefor is filed either on or before April 1, 1926, or within four years from the time the tax was paid. If any such waiver so filed has, before the expiration of the period thereof, been extended either by the filing of a new waiver or by the extension of the original waiver, then such credit or refund relating to the taxes for the year in respect of which the waiver was filed shall be allowed or made if claim therefor is filed either (1) within four years from the time the tax was paid, or (2) on or before April 1, 1926, in the case of credits or refunds relating to the taxes for the taxable years 1917 and 1918, or on or before April 1, 1927, in the case of credits or refunds relating to the taxes for the taxable year 1919."

Section 1113 (a) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 116, provides:

> Section 3226 of the Revised Statutes, as amended, is reenacted without change, as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credt has been duly filed with the Commissioner of Internal Revenue according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

Sections 608 and 610 of the Revenue Act of 1928, c. 852, 45 Stat. 791, 874, 875, provide:

SEC. 608. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST TAXPAYER.

A refund of any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) made after the enactment of this Act, shall be considered erroneous—

(a) if made after the expiration of the period of limitation for filing claim there-

for, unless within such period claim was filed; or

(b) in the case of a claim filed within the proper time and disallowed by the Commissioner after the enactment of this Act, if the refund was made after the expiration of the period of limitation for filing suit, unless—

(1) within such period suit was begun by the taxpayer, or

(2) within such period, the taxpayer and the Commissioner agreed in writing to suspend the running of the statute of limitations for filing suit from the date of the agreement to the date of final decision in one or more named cases then pending before the United States Board of Tax Appeals or the courts.

SEC. 610. RECOVERY OF AMOUNTS ERRONEOUSLY REFUNDED.

(a) Any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) refund of which is erroneously made, within the meaning of section 608, after the enactment of this Act, may be recovered by suit brought in the name of the United States, but only if such suit is begun within two years after the making of such refund.

(b) Any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) which has been erroneously refunded (if such refund would not be considered as erroneous under section 608) may be recovered by suit brought in the name of the United States, but only if such suit is begun before the expiration of two years after the making of such refund or before May 1, 1928, whichever date is later.

Sections 3226 and 3227 of the Revised Statutes provided (during the litigation of *United States* v. *Kaufman* and *United States* v. *Savings Bank*, *supra*):

> SEC. 3226. No suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until appeal shall have been duly made to the Commissioner of [*the*] Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of the Commissioner has been had therein: *Provided*, That if such decision is delayed more than six months from the date of such appeal, then the said suit may be brought, without first having a decision of the Commissioner at any time within the period limited in the next section.
>
> SEC. 3227. No suit or proceeding for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, shall be maintained in any court, unless the same is brought within two years next after the cause of action accrued: *Provided*, That actions for such claims which accrued prior to June six, eighteen hundred and seventy-two, may be brought within one year from said date; and that where any such claim was pending before the Commissioner, as provided in the

preceding section, an action thereon may be brought within one year after such decision and not after. But no right of action which was already barred by any statute on the said date shall be revived by this section.

REGULATIONS

Article 1306 of Treasury Regulations 65, promulgated under the Revenue Act of 1924, provides:

> ART. 1306. *Claims for refund of taxes erroneously collected.*—Claims by the taxpayer for the refunding of taxes, interest, penalties, and additions to tax erroneously or illegally collected shall be made on Form 843. All facts relied upon in support of the claim should be clearly set forth under oath. In the case of the taxpayer's death, certified copies of the letters of administration or letters testamentary or other similar evidence must be annexed to the claim to show the authority of the administrator or executor. The affidavit may be made by the agent of the person assessed, but in such case a power of attorney must accompany the claim. Checks in payment of claims allowed will be drawn in the names of the persons entitled to the money and will be sent directly to the proper persons. The Commissioner has no authority to refund on equitable grounds penalties legally collected. As to claims for refund of sums recovered by suit, see article 1353.

Similar provisions are contained in Article 1352 of Treasury Regulations 69, promulgated under the Revenue Act of 1926.

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